Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

No. 74-364

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. HALE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of agrument	6
Argument:	
I. The jury should be permitted to assess the credibility of a defendant's testimony by learning of his prior failure to explain seemingly incriminating circumstances to the police	12
A. The necessity to test the credibility of a defendant's testimony and to obtain the "whole truth" requires that the jury be allowed to consider his prior failure to tell it to the police	12
B. Neither *Griffin* nor *Miranda* requires the result reached by the court of appeals	22
II. Testing of a defendant's credibility by reference to his prior failure to give his story to the police neither coerces nor impermissibly burdens his choice to remain silent before the police, nor is it unfair	27
A. The possibility of impeachment of a defendant's testimony by reference to his prior silence is a far less severe detriment than other disadvantages that this Court has held may constitutionally attach to exercise of the privilege against self incrimination, nor does it constitute an impermissible compulsion to answer police questions	28
B. It is not "unfair" to advise an accused that he has a right to remain silent and then use his silence to impeach his trial testimony	38
C. The constitutional values and policies reflected in the privilege against self incrimination were not impaired by the cross-examination of respondent	40
III. The jury is competent to gauge the probative weight of such impeachment evidence	43

658-620—75——1

Page

Conclusion 55

CITATIONS

Cases:

Adamson v. *California*, 332 U.S. 46 46
Agnellino v. *State of New Jersey*, 493 F. 2d 714 16
Brady v. *United States*, 397 U.S. 742 32
Brown v. *Mississippi*, 297 U.S. 278 30
Brown v. *United States*, 356 U.S. 148 37
Bruno v. *United States*, 308 U.S. 287 23
Caminetti v. *United States*, 242 U.S. 470 18
Deats v. *Rodriguez*, 477 F. 2d 1023 16
Egger v. *United States*, C.A. 9, No. 74–2196, decided January 2, 1975 5
Elkins v. *United States*, 364 U.S. 204 7
Fitzpatrick v. *United States*, 178 U.S. 304 37
Fowle v. *United States*, 410 F. 2d 48 16
Gallegos v. *Colorado*, 370 U.S. 49 30
Garrity v. *New Jersey*, 385 U.S. 493 ..... 29, 30
Griffin v. *California*, 380 U.S. 609 ..... 5, 8, 22, 23, 24, 26, 30
Grunewald v. *United States*, 353 U.S. 391 ..... 5, 11, 12, 21, 44, 50, 52, 54, 55
Harris v. *New York*, 401 U.S. 222 ..... 6, 7, 8, 13, 14, 15, 16, 17, 26, 42
Johnson v. *Patterson*, 475 F. 2d 1066, certiorari denied, 414 U.S. 878 16
Johnson v. *United States*, 318 U.S. 189 40
Malloy v. *Hogan*, 378 U.S. 1 29
McGautha v. *California*, 402 U.S. 183 ..... 9, 31, 34
McMann v. *Richardson*, 397 U.S. 759 32
Michigan v. *Tucker*, 417, U.S. 433 ..... 24, 25, 29
Miranda v. *Arizona*, 384 U.S. 436 ..... 3, 6, 8, 9, 10, 14, 17, 24, 25, 26, 28–29, 30, 38, 39, 43, 46, 52
Murphy v. *Waterfront Commission*, 378 U.S. 52 40
Nardone v. *United States*, 308 U.S. 338 43
Parker v. *North Carolina*, 397 U.S. 790 32
Raffel v. *United States*, 271 U.S. 494 ..... 8, 13, 18, 19, 20, 21, 23, 26, 48
Robideau v. *Rhay*, 431 F. 2d 880 16
Schneckloth v. *Bustamonte*, 412 U.S. 218 38
Segura v. *Patterson*, 402 F. 2d 249 37

Cases—Continued

Page

Spencer v. *Texas*, 385 U.S. 554 ..... 13, 37, 48
State v. *Anderson*, 253 S.C. 168, 169 S. E. 2d 706, rehearing denied, 397 U.S. 1031 49
Stewart v. *United States*, 366 U.S. 1 21
United States v. *Brinson*, 411 F. 2d 1057 16
United States v. *Calderon*, 348 U.S. 160 37
United States v. *Fairchild*, C.A. 5, No. 74–2097, decided January 8, 1975 16
United States v. *Kordel*, 397 U.S. 1 26
United States v. *Nixon*, No. 73–1766, decided July 24, 1974 7
United States v. *Quintana-Gomez*, 488 F. 2d 1246 16
United States v. *Ramirez*, 441 F. 2d 950, certiorari denied, 404 U.S. 869 15
United States v. *Ravich*, 421 F. 2d 1196 49
United States ex rel. Burt v. *State of New Jersey*, 475 F. 2d 234 ..... 16, 17
Vajtauer v. *Commissioner of Immigration*, 273 U.S. 103 26
Walder v. *United States*, 347 U.S. 62 13
Watts v. *Indiana*, 338 U.S. 49 30
Williams v. *Florida*, 399 U.S. 78 ..... 9, 34, 35, 36, 42
Wilson v. *United States*, 149 U.S. 60 ..... 19, 23

Constitution, statutes and rule:

United States Constitution, Fifth Amendment 2, 6, 8, 12, 14, 18, 20, 21, 22, 25, 26, 27, 28, 30, 31, 32, 35, 43, 49, 52, 54
United States Constitution, Fifth Amendment 2,
18 U.S.C. 3481 19
22 D.C. Code 2901 2
Fed. R. Evid. 403 49

Miscellaneous:

ALI, Uniform Rules of Evidence, Rule 45 49
British Criminal Law Revision Committee, Eleventh Report, Evidence (General) 16 (England, 1972) 49
Cross, *Evidence* 180 (1967) 49
1 Wigmore, *Evidence*, § 58, 196 (McNaughton rev. ed 196) 48
3 A Wigmore, *Evidence*, § 890 (McNaughton rev. ed. 1961) 13
8 Wigmore, *Evidence* (McNaughton rev. ed. 1961):
§ 2276 19
§ 2251 43

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 498 F. 2d 1038.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on May 21, 1974, and the court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* on August 1, 1974 (Pet. Apps. C and D). On August 26, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 30, 1974, on which date the government's petition was filed. The

petition was granted on December 9, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fifth Amendment bars cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, respondent was found guilty of robbery, in violation of 22 D.C. Code 2901.[1] Imposition of sentence was suspended, and he was placed on probation for three years. On appeal, the court of appeals reversed respondent's conviction (498 F. 2d 1038; Pet. App. A).

1. The government's case rested largely on the testimony of Lonnie Arrington, the complaining witness, who testified that respondent was one of five men who robbed him of approximately $96 (Tr. 25–30).[2] Dur-

[1] Respondent's co-defendant, Flemming Anderson, was indicted on February 10, 1972. Both cases were consolidated for trial.

[2] Arrington conceded on cross-examination that he had originally told the police that the robbers had taken $65. He explained that this was an estimate given shortly after the robbery. After he had an opportunity to discuss the day's purchases with his wife, however, he re-estimated his loss to be about $96, and he testified to that effect before the grand jury (Tr. 55–56).

ing the course of the robbery, Arrington thought he saw the person who took his roll of money pass it all to respondent (Tr. 36). Soon after the robbery occurred, as Arrington waited with a police officer for a scout car to take him through the area to search for the robbers (Tr. 38–39), he spotted respondent walking with another man (Tr. 39, 41, 73) and recognized respondent as one of the men who had just robbed him (Tr. 39). When, in response to Arrington's identification, the officer approached respondent and his companion, respondent fled (Tr. 39–40). After a short chase, he was apprehended a few blocks away and arrested.

The record indicates that respondent was then taken to the police station and informed of his rights in accordance with *Miranda* v. *Arizona,* 384 U.S. 436, including his right to remain silent (Tr. 259). He was then searched and found to have $123 in his pants pocket (Tr. 112–113). Respondent offered no explanation of this suspicious circumstance when questioned by the police regarding his possession of the money (App. 5).[3]

2. At trial, respondent's estranged wife testified that she had received a $180 welfare check on the day of

[3] The fact that the police specifically *asked* respondent to explain his possession of the money found on his person was revealed by the prosecutor at a bench conference following cross-examination in which respondent had already admitted that he had offered no such explanation (App. 5). Had the prosecutor been permitted to continue the line of questioning, therefore, he would have had an opportunity to elicit the fact that no explanation had been proffered despite specific police inquiry.

the robbery (Tr. 190–193) and, after cashing it, had given respondent about $150 of the total with which to purchase some money orders (Tr. 194, 196–197). Respondent then testified on his own behalf and provided the same explanation for his possession of the money—that his wife had received her welfare check that day and had given him about $150 so that he could purchase some money orders for her (Tr. 217–219). Subsequently, on his way to obtain the money orders, he encountered a friend (Tr. 226). Shortly thereafter, as respondent and his friend walked near the police station, several officers approached and attempted to talk to him. Because respondent's friend had narcotics in his possession, respondent fled from the police, fearing that he would be implicated (Tr. 227).

3. In an effort to impeach respondent's testimony, the prosecutor led respondent on cross-examination to admit that he had not explained to the police at the time of his arrest the source of the money found on his person (App. 4):

> Q. Did you in any way indicate [to the police] where that money came from?
>
> A. No, I didn't.
>
> Q. Why not?
>
> A. I didn't feel that it was necessary at the time.
>
> Q. You were advised of your rights, were you not?
>
> A. Yes.

Immediately following this exchange, the district court cautioned the jury that the questioning was improper and that they should disregard it. The court stated (Pet. App. A, p. 17A; App. 5):[4]

> He is not required to indicate where the money came from. There is no responsibility on his part in regard to that. * * * I indicated to the jury that it is clearly an inappropriate question. You may disregard it, ladies and gentlemen. The defendant is not required to give any explanation whatsoever at the time of his arrest.

4. In a 2–1 decision, the court of appeals ruled that this cross-examination was improper and required a new trial. The majority reasoned that *Griffin* v. *California,* 380 U.S. 609, barring comment to the jury upon a defendant's failure to testify at trial, similarly barred disclosure of a defendant's assertion of his Fifth Amendment privilege during police interrogation. Moreover, since respondent was told that he had a right to remain silent during interrogation, his failure to explain to the police the source of the money found on his person was considered to be not inconsistent with his subsequent trial testimony. The majority relied in this regard upon *Grunewald* v. *United States,* 353 U.S. 391, in which this Court prohibited

[4] The majority in the court of appeals rejected the notion that this caution to the jury overcame the effect of the impropriety it found in the prosecutor's questions (Pet. App. A, p. 13A). We, of course, disagree with the statement of the district court and the conclusion of the court of appeals that the questioning was improper. In any event, we do not rely here on any argument that the district court's caution to the jury was sufficient to obviate the error, if there was error. See note 5, *infra.* But see *Egger* v. *United States,* C.A. 9, No. 74–2196, decided January 2, 1975.

568—620—75——2

cross-examination of a defendant as to a prior, valid assertion of his Fifth Amendment privilege before a grand jury.

Judge Wilkey dissented on the ground, *inter alia,* that a defendant who testifies at trial waives the privilege against self-incrimination and is subject, as any other witness, to extensive cross-examination calculated to test his credibility (Pet. App. A, pp. 17A–31A). Relying upon *Harris* v. *New York,* 401 U.S. 222, in which this Court held that a defendant could be impeached by statements given the police in the absence of sufficient *Miranda* warnings, Judge Wilkey reasoned that a defendant's failure to offer the police an explanation of incriminating circumstances should be disclosed to the jury in order to enable it reasonably to evaluate the credibility of the defendant's trial testimony.[5]

SUMMARY OF ARGUMENT

The existence of an adequate opportunity to test the credibility of a defendant who takes the stand in his own behalf is crucial to the mission of a trial—accurate ascertainment of the truth. "The need to develop all relevant facts in the adversary system

[5] Judge Wilkey also relied for his dissent on the alternative ground, rejected by the majority (Pet. App. A, pp. 12A–15A), that even if the questioning were deemed improper, the defect was harmless beyond a reasonable doubt and therefore did not warrant reversal of respondent's conviction (Pet. App. A, pp. 31A–33A). While we agree with Judge Wilkey's analysis of this issue, the controversy on the point involves the application of an essentially undisputed standard to the facts of a particular case. Accordingly, we did not present the "harmless error" issue in our petition for certiorari.

is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States* v. *Nixon,* No. 73–1766, decided July 24, 1974, slip op. 24. Exceptions to the age-old principle demanding "every man's evidence" should not be lightly created nor expansively construed. "Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means of ascertaining truth." *Elkins* v. *United States,* 364 U.S. 206, 234 (Frankfurter, J., dissenting, cited with approval in *United States* v. *Nixon, supra,* slip op. at 25, n. 18).

In disallowing a form of cross-examination that exposes a testifying defendant's prior failure to explain seemingly incriminating circumstances, however, the court below ignored this precept and effectively rendered a defendant immune from one of the "traditional truth-testing devices of the adversary process," *Harris* v. *New York,* 401 U.S. 222, 225. Here, respondent took the stand in his own defense and testified that on the morning of the robbery his wife had given him the cash that was found on his person soon after the robbery, for the purpose of obtaining some money orders with which she could pay some bills (Tr. 219). Cross-examination designed to discredit this explanation by revealing that respondent had failed to provide it to the police was, how-

ever, held to be violative of respondent's Fifth Amendment privilege.

We submit that the exclusion of such plainly relevant and probative evidence, going to the credibility of respondent's explanation of otherwise incriminating circumstances, finds no support in either the history or the logic of the Fifth Amendment privilege against self-incrimination. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that the defendant chose to remain silent during post-arrest questioning, once the defendant chooses to take the stand and testify in his own behalf the privilege no longer bars the introduction of such evidence for the limited purpose of impeaching his trial testimony. *Harris* v. *New York,* 401 U.S. 222; *Raffel* v. *United States,* 271 U.S. 494.

The court of appeals' majority erroneously relied on *Griffin* v. *California,* 380 U.S. 609, and *Miranda* v. *Arizona,* 384 U.S. 436, as governing this case. *Griffin* is critically different, however, because it involved a non-testifying defendant, so that the "whole truth" policy of *Harris* and the waiver principles of *Raffel* were not implicated. As for *Miranda,* its principal thrust was to protect against impermissible coercion of arrestees; here, respondent did enjoy a free choice between voluntary silence and voluntary speech. Either election may, of course, carry potentially disadvantageous consequences, but that is no objection so long as the choice between them is not impermissibly compelled.

Nor is a suspect's election to remain silent during custodial interrogation impermissibly burdened by the possibility that, should he decide to testify at trial regarding the seemingly incriminating circumstances of his arrest, he may also be called upon to explain to the jury why he previously failed to offer such information to the police. Such a strategically disadvantageous consequence of invoking the privilege entails nothing more than a choice about trial tactics. It is a kind of consequence inherent in our adversary system, and one that has never been found to place an impermissible burden upon the right to remain silent. See *McGautha* v. *California,* 402 U.S. 183; *Williams* v. *Florida,* 399 U.S. 78. It in no way compels an accused to waive his privilege, in terms of criteria to which this Court has referred for ascertaining voluntariness, nor does it undermine the other values that the privilege against self-incrimination has been thought to protect.

The court of appeals also predicated its decision on the notion that it is unfair to tell a suspect that he has a right to remain silent and then make some use of that silence against him. The *Miranda* warning does not, however, make any kind of promise to the arrestee that his silence will carry with it no adverse consequences. Indeed, it could not properly do so, since, apart from the consequence at issue in this case, other more substantial and more immediate adverse consequences are likely to flow from failure to tender a satisfactory explanation of incriminating circumstances, foremost among which is the enhanced likelihood that

there will be a criminal prosecution of the arrestee. Finally, with regard to the question of fairness, the court of appeals has erroneously equated the standards for assuring an informed *waiver* of a constitutional right with those that should govern a decision *not* to waive an approach that is not only unprecedented and unjustified, but revolutionary in its ramifications.

Apart from these relatively direct constitutional considerations, there remains the question whether such cross-examination should be proscribed because its potential for prejudice inevitably outweighs its probative value. We believe there is no sound foundation for such a conclusion, and that a prior failure to explain is often probative of the falsity of the explanation proffered at trial. It defies common sense to deny that a suspect who has a truthful, innocent explanation for otherwise incriminating facts about which the police have knowledge will in most circumstances decide that disclosure is advantageous despite the fact that it is not required, since an exculpatory explanation, if he has one, may well result in his immediate release from the criminal process and will at a minimum neutralize the danger from those facts. Another practical incentive for disclosure of an exculpatory explanation is the fact that prompt disclosure provides an opportunity for independent verification free of the suspicions of fabrication that prosecutive authorities might naturally be expected to entertain in the case of delayed explanations.

The *Miranda* warnings, informing a suspect that he

has a right to remain silent during custodial interrogation, do not stand for the proposition, nor they intended to foster the impression, that the suspect should maintain his silence notwithstanding any advantage that may accrue to him upon disclosure. The failure to give an explanation to the police will therefore in many circumstances cast real doubt upon the veracity of the explanation when offered at trial.

Although the probative weight to be given any particular failure to explain incriminating circumstances to the police presumably will depend upon many factors—including the relative ease of providing the information to the police and the concomitant ease with which the police could assess its accuracy, as well as the personal characteristics of the accused—there is no reason to assume that the jury will be unable accurately to assess the probative value of such evidence, particularly where, as here, the court cautions the jury that an accused is not required to offer information to the police. Indeed, the defendant has an opportunity at trial to rebut any unfavorable inference to which his silence before the police may have given rise by explaining to the jury his reason for deciding not to provide the police with the information about which he subsequently testifies. In short, it cannot fairly be said that the availability of such evidence is more likely to hinder than to aid the jury in its search for the truth.

The court of appeals believed its contrary conclusion to be dictated by *Grunewald* v. *United States,* 353 U.S. 391, which held that, in the "particular circumstances" of that case, the defendant's refusal on self-

incrimination grounds to testify before the grand jury had no probative impact on the credibility of his trial testimony. That particularized conclusion was no doubt sound, but the facts in *Grunewald* and those of the instant case are worlds apart. Moreover, in *Grunewald* the cross-examination revealed an affirmative claim by the defendant on an earlier occasion that his answers might tend to incriminate him, information that carried a high risk of improperly prejudicing the jury. No such information was conveyed to the jury by the cross-examination of respondent.

ARGUMENT

I. THE JURY SHOULD BE PERMITTED TO ASSESS THE CREDIBILITY OF A DEFENDANT'S TESTIMONY BY LEARNING OF HIS PRIOR FAILURE TO EXPLAIN SEEMINGLY INCRIMINATING CIRCUMSTANCES TO THE POLICE

A. The necessity to test the credibility of a defendant's testimony and to obtain the "whole truth" requires that the jury be allowed to consider his prior failure to tell it to the police

A defendant who takes the stand places himself in a fundamentally different position from one who does not. Once on the stand, he is subject like any other witness to cross-examination designed to assure the reliability of his testimony. Moreover, by choosing to tell his side of the story to the jury, he waives his Fifth Amendment privilege not only as to the part of his story that he wishes the jury to hear, but as to the *whole* story. We submit that both principles—the necessity for testing the truth of a defendant's testimony and the quest for the "whole" truth—make it

proper to cross-examine a defendant as to why he failed to tell his story to the police.[6]

1. Once he takes the stand and testifies on his own behalf, a defendant may be cross-examined like any other witness as to matters reasonably related to the subject of his direct examination[7]—including matters that otherwise could not be brought to the jury's attention, such as prior convictions, *Spencer* v. *Texas,* 385 U.S. 554, 561; evidence unlawfully seized, *Walder* v. *United States,* 347 U.S. 62; refusals to testify on his own behalf at prior trials, *Raffel* v. *United States,* 271 U.S. 494, 499; or inconsistent statements made during police interrogation without proper *Miranda* warning, *Harris* v. *New York, supra.*

A defendant's silence during police interrogation should be no exception to this principle. Although it may be impermissible for the prosecution to introduce as evidence of guilt the fact that an accused chose to remain silent during interrogation or failed to offer an innocent explanation of seemingly incriminating circumstances, when a defendant testifies the jury should be permitted to assess the credibility of his story by learning that he previously declined to tell it to the authorities. A defendant's alibi or ex-

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[6] The guilty criminal defendant has substantial incentives to commit perjury, in view of the personal consequences of a conviction. At the same time, the constraints that normally operate to discourage witnesses from prevarication apply with diminished force to the criminal defendant. These factors make it especially important to allow thorough probing of the veracity of the testifying defendant.

[7] See 3A Wigmore, *Evidence* § 890 (McNaughton rev. ed. 1961) and cases cited therein.

568-620—75——3

culpatory testimony—often central to his defense—should not be any more immunized from accurate evaluation than the testimony of any other witness. Nor should an accused's choice to remain silent during police interrogation thereby license him to give false testimony at trial, free from the possibility that he may be called upon to explain why he failed to give the exculpatory information to the authorities at the time of his arrest.

Harris v. *New York, supra,* provides strong support for this proposition. There, the defendant, charged with selling heroin to an undercover police officer, took the stand in his own defense and denied the sale. On cross-examination, the defendant was asked about certain statements he had made to the police that were inconsistent with his trial testimony. Those statements had not, however, been preceded by proper *Miranda* warnings, and they therefore had to be deemed presumptively coerced in violation of the defendant's Fifth Amendment privilege. *Miranda* v. *Arizona,* 384 U.S. 436. The trial judge permitted the questioning, instructing the jury that the statements attributed to the defendant by the prosecution could be considered only in determining credibility and not as evidence of guilt.

This Court held that the Fifth Amendment does not bar the introduction of such statements, although made without adequate *Miranda* warnings, for the limited purpose of impeaching a defendant's trial testimony. While such statements are irrebutably presumed to be compelled in derogation of the Fifth

Amendment when admitted as evidence of guilt, the Court in *Harris* reasoned (401 U.S. at 224–225):

> It does not follow * * * that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes * * *. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

The Court observed that prohibiting the use of such statements would be tantamount to licensing a defendant to resort to perjured testimony in reliance on the government's disability to challenge his credibility. "But that privilege [against self-incrimination] cannot be construed to include the right to commit perjury * * * by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 225–226.

If the jury may test a defendant's credibility by reference to prior inconsistent statements elicited in presumptive violation of his Fifth Amendment privilege, it follows that the jury should be permitted to test a defendant's credibility by reference to his prior inconsistent silence at the time of his arrest, when there has been no such violation.[8] Had respondent

[8] Two of the circuits that have considered the question whether a defendant's silence at police interrogation can be used to impeach his credibility at trial have concluded, in light of *Harris*, that such cross-examination is constitutionally permissible. Thus, in *United States* v. *Ramirez*, 441 F. 2d 950 (C.A. 5), certiorari denied, 404 U.S. 869, the defendant testified at trial that he had been coerced into selling heroin by

given the police an explanation of the source of his money contrary to the one he subsequently gave at

threats of harm from strangers. On cross-examination he admitted that he had never told the police this fact, and in closing argument the prosecutor urged that this silence was not consistent with the conclusion that the trial testimony was truthful. On appeal, the Fifth Circuit, relying on *Harris*, stated (401 U.S. at 954):

"Once [the defendant] elected to testify and assert the defense of coercion he became subject to the 'traditional truth-testing devices of the adversary process,' including the right of the prosecution to show his prior inconsistent act of remaining silent at the time of his arrest."

See also, *United States ex rel. Burt* v. *State of New Jersey*, 475 F. 2d 234 (C.A. 3); *Agnellino* v. *State of New Jersey*, 493 F. 2d 714 (C.A. 3); *United States* v. *Quintana-Gomez*, 488 F. 2d 1246 (C.A. 5); contra: *United States* v. *Brinson*, 411 F. 2d 1057 (C.A. 6); *Robideau* v. *Rhay*, 431 F. 2d 880 (C.A. 9); *Fowle* v. *United States*, 410 F. 2d 48 (C.A. 9); *Johnson* v. *Patterson*, 475 F. 2d 1066 (C.A. 10), certiorari denied, 414 U.S. 868; *Deats* v. *Rodriguez*, 477 F. 2d 1023 (C.A. 10). In its latest pronouncement on the subject, the Fifth Circuit seems to have retreated slightly from its broad holding in *Ramirez*, *supra*. See *United States* v. *Fairchild*, C.A. 5, No. 74-2097, decided January 8, 1975.

The position of the Third Circuit is not altogether clear. In *Burt*, *supra*, the defendant testified that the shooting death for which he had been charged with murder had been accidental. The prosecution elicited on cross-examination the fact that, when he had been arrested for an unrelated crime soon after the shooting, the defendant had not sought to secure assistance for the victim. The lead opinion in *Burt* held that the cross-examination was permissible because the defendant's silence during police interrogation had occurred before he stood accused of the murder. The other two members of the panel, however, issued a concurring opinion on the ground that *Harris* allows impeachment by prior silence at a police station.

In *Agnellino*, *supra*, the defendant made statements to the police but failed to indicate the source of stolen goods that were found on his property. He testified at trial that he had pur-

trial, it is clear under the *Harris* holding that such explanation would have been admissible to impeach his credibility even had it not been preceded by *Miranda* warnings. The same reasoning would seem to apply even more forcefully to the instant case, where the police acted entirely properly in providing respondent full *Miranda* warnings, no statements of any kind were elicited, and there is no question of coercion.

Moreover, while the use of *statements* elicited without *Miranda* warnings may, as this Court recognized in *Harris*, give rise to an arguably "speculative possibility that impermissible police conduct will be encouraged thereby" (401 U.S. at 225)—a possibility outweighed, in the Court's view, by the benefit to the fact-finding process of giving the jury an opportunity to assess the credibility of the defendant's testimony—cross-examination such as that in the instant case, which merely apprises the jury of a defendant's *silence* before the police, obviously does not present even that nominal danger.

2. By the same token, a defendant's silence during police interrogation should be no exception to the re-

chased them. During closing argument, the prosecutor commented upon the defendant's prior failure to provide this information to the police. The lead opinion, relying upon the concurring opinion in *Burt*, held that the prosecutor's comment was permissible. The other two members of the panel, however, concurred on the basis that what the defendant had *told* the police was inconsistent with his trial testimony. They viewed *Burt* as a situation in which the defendant's *conduct* in not seeking assistance for the shooting victim was inconsistent with his testimony at trial that the shooting had been accidental.

lated principle that a defendant who offers himself as a witness thereby waives his Fifth Amendment privilege *without reservation.* "His waiver is not partial; having once cast aside the cloak of immunity, he may not resume it at will, whenever cross-examination may be inconvenient or embarrassing." *Raffel* v. *United States, supra,* 271 U.S. at 497. Having chosen to waive the privilege at trial, therefore, a defendant should not at the same time be insulated from consideration of the import of his prior silence before the police. He "may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events"—such as his prior silence before the police— "* * * without subjecting his silence to the inferences to be naturally drawn from it." *Caminetti* v. *United States,* 242 U.S. 470, 494.

There is sound policy in requiring a defendant who offers himself as a witness to do so without reservation and in allowing the prosecution to probe all seemingly incriminating circumstances relevant to the defendant's testimony, including the fact that he previously failed to give the police the exculpatory information he gives the jury. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." *Raffel, supra,* 271 U.S. at 499. A defendant who becomes a witness in his own behalf benefits from the opportunity to tell the jury his side of the story. But the opportunity should not be one-sided:

> [An accused's] voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts* because of the necessary connection between them all. *Any* voluntary disclosure by the accused * * * distorts the probative picture. * * * The accused has the choice at the outset [whether or not to take the stand], unhurried and with full knowledge that all questions will relate to his incrimination [8 Wigmore, *Evidence,* § 2276, pp. 459–460 (McNaughton rev. ed. 1961)].

A fair balance of advantages requires that the jury have an opportunity to hear the entire story—including the fact that the defendant previously failed to tell his side of the story to the police.

The decision of the court of appeals in the instant case squarely conflicts with the analysis of this Court in *Raffel* v. *United States, supra,* and affirmance in the case at bar would, we submit, require the Court to overrule *Raffel* or confine that precedent to its specific facts. In *Raffel* this Court held that it was permissible to cross-examine a defendant as to his reasons for failing to take the stand at a prior trial, when his purpose in testifying at the second trial was to rebut a witness who testified at both trials. Raffel's first trial, in which he had failed to testify, resulted in a mistrial; at his second trial on the same charge the government presented the same witness who had appeared at the first trial. This time, Raffel chose to take the stand and rebut the witness's testimony. Although comment upon a defendant's failure to take the stand was prohibited by statute and judicial decision (18 U.S.C. 3481; *Wilson* v. *United States,* 149 U.S. 60), the judge then asked Raffel questions that

required him to disclose that he had not testified at the first trial and to explain why he had not done so. The second trial resulted in conviction.

The Court, in an opinion by Justice Stone, determined that the Fifth Amendment privilege provides no basis for excluding the defendant's admission at the second trial that he had failed to take the stand at the previous trial because "I did not think there was enough evidence to do it" (271 U.S. at 495, note). The Court rejected the theory that the defendant's original immunity should be held to survive his appearance at the second trial (*id.* at 498–499):

> The only suggested basis for [extending the immunity beyond the first trial is the] pressure on the accused to take the stand on the first trial for fear of the consequences of his silence in the event of a second * * *. [But e]ven if, on his first trial, he were to weigh the consequences of his failure to testify * * * in the light of what might occur on a second trial, it would require delicate balances to enable him to say that the rule of partial immunity would make his burden less onerous than the rule that he may remain silent, or at his option, testify fully, explaining his previous silence. We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantive manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not.

Once the defendant takes the stand at the second trial, therefore, he effectively waives his immunity

retroactively as to both trials, since "[w]e can discern nothing in the policy of the law against self-incrimination which would require the extension of the immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify." 271 U.S. at 499.

If a defendant under such circumstances waives his Fifth Amendment privilege respecting inquiry into his failure to testify at a prior trial, it follows that a defendant who takes the stand at his trial also waives any Fifth Amendment privilege he may have relating to his silence during police interrogation. Like Raffel's choice not to testify at his first trial, respondent in his encounter with the police chose not to tell them where he obtained the money found on his person. We submit that his omission, like Raffel's, can properly be revealed to the jury to aid them in assessing his credibility. Any other rule unacceptably enhances the prospect that jury verdicts will be based upon fabricated accounts not adequately tested by cross-examination.[9]

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[9] *Stewart* v. *United States*, 366 U.S. 1, cited by the majority below, is not inconsistent with *Raffel*. In *Stewart*, a defendant who pleaded not guilty by reason of insanity took the stand and made various unintelligible statements. During cross-examination the prosecutor elicited the fact that the defendant had not testified during two previous trials, which had resulted in convictions that were reversed on appeal. In ruling this cross-examination improper, the Court noted that neither *Raffel* nor *Grunewald* was applicable, since the cross-examination in *Stewart* sought to discredit the claim of insanity rather than to impeach the defendant's testimony.

568-620—75——4

B. Neither Griffin nor Miranda requires the result reached by the court of appeals

Neither *Griffin* v. *California, supra,* nor *Miranla* v. *Arizona,* 384 U.S. 436, both relied upon by the majority below, is inconsistent with this analysis. At most, those cases express the proposition that a defendant may, in accord with his Fifth Amendment privilege, remain silent without his silence being used against him *as evidence of guilt.* But that proposition is fully consonant with use of a defendant's silence as evidence of his prevarication on the witness stand.

1. The defendant in *Griffin* was convicted of first degree murder after a jury trial in which he chose not to take the stand in his own defense. The trial court instructed the jury that, while the defendant had a constitutional right not to testify, and his failure to deny or explain incriminating circumstances of which he had knowledge did not create a presumption of guilt or relieve the prosecution of any of its burden of proof, the jury could take defendant's failure to testify as to such evidence into consideration "as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (380 U.S. at 610). In closing argument, moreover, the prosecution made several allusions to the defendants' failure to deny or explain incriminating circumstances. On those facts, the Court reversed Griffin's conviction, holding that such comments to the jury about a defendant's failure to testify violated the defendant's Fifth Amendment privilege.

The Court in *Griffin* was concerned about the direct use of a defendant's decision not to testify (which was undeniably an invocation of his privilege against self-incrimination) as affirmative evidence of guilt. "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into *evidence against him* is quite another." 380 U.S. at 614 (emphasis added). The Court neither said nor implied that the same rule would apply to evidence used to impeach a defendant's trial testimony, nor did the Court mention *Raffel, supra,* which permits comment upon a defendant's failure to take the stand at a previous trial for the purpose of impeaching his testimony at a subsequent trial. Indeed, it seems clear that the decision in *Griffin* did not call into question the holding in *Raffel,* since at the time *Raffel* was decided it had long been the rule in federal courts that no comment could be made upon a defendant's failure to take the stand. See *Wilson* v. *United States, supra*; 18 U.S.C. 3481.[10]

Moreover, the situation in *Griffin* presented a problem that is absent in circumstances such as *Raffel* or the instant case. Under the approach followed by the California courts in *Griffin*, the jury was expressly encouraged to infer that unexplained incriminating circumstances were true, and the defendant, since he did not testify, had no opportunity to rebut the infer-

[10] The Court has specifically reserved the related question whether an accused is constitutionally entitled to have the jury instructed that his silence must be disregarded. *Griffin, supra,* 380 U.S. at 615, n. 6. See also *Bruno* v. *United States,* 308 U.S. 287, 292.

ence. As a result of invoking the privilege in *Raffel* (and of remaining silent in the instant case), however, the defendant at most risked being called upon to explain why he previously failed to take the stand or provide information. The jury may disbelieve his explanation, and their disbelief will cast doubt upon the veracity of his present testimony. On the other hand, the jury may be sufficiently satisfied with the explanation that any unfavorable inference otherwise flowing from his previous silence is effectively rebutted. Thus, in *Raffel,* as in the instant case but unlike *Griffin,* the defendant had an opportunity to eliminate any unfavorable inference resulting from his silence, and the accuracy of the inference was "subject to the normal testing process of an adversary trial." *Michigan* v. *Tucker,* 417 U.S. 433, 449.

2. The court of appeals' reliance on *Griffin* was predicated on its conclusion that respondent, like Griffin, was "exercis[ing] his constitutional right to remain silent" and that the cross-examination constituted an attempt to penalize him for assertion of this right (Pet. App. A, p. 10A). The court of appeals did not independently analyze the validity of its focal postulate that respondent was exercising a "constitutional right" when he remained silent and was impermissibly penalized therefor when cross-examined, but simply relied upon the following dictum contained in a footnote in *Miranda* (384 U.S. at 468, n. 37):

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

In considering whether this dictum should now be elevated into a constitutional holding, the circumstances of its utterance merit attention: (1) None of the cases before the Court in the *Miranda* group involved defendants who had stood silent or whose silence had been used in any manner against them at trial; (2) since the thrust of the Court's rationale in *Miranda* focused upon the inherently coercive effects found by the Court to accompany custodial interrogation, the characterization of an arrestee's voluntary silence as an exercise of the Fifth Amendment privilege was logically unrelated to the theme of coercion that dominated the Court's opinion; and (3) the quoted statement contained no explication of the basis for the conclusion it contained, and the case law cited in support of the conclusion (by "cf."), including *Griffin*, dealt with quite distinct situations.

In our view, the Fifth Amendment privilege does not confer any *per se* "right to remain silent" as a personal entitlement that the government is affirmatively obliged to fulfill. The obligation that the Fifth Amendment privilege imposes upon the government is a negative one to avoid compulsion, and the correlative right is to be free from being *compelled* to speak. Cf. *Michigan* v. *Tucker, supra.* The right to be free from improper compulsion is by its nature not a right that the individual *exercises* but, rather, one that he

enjoys.[11] Accordingly, it was not only too facile, but also erroneous, to characterize the cross-examination to which respondent was here subjected as a penalty for the exercise of a right.[12]

But even putting to one side these conceptual objections to the *Miranda* dictum and accepting it as a correct statement of the governing rule, it is properly understood as a bar to use of a defendant's silence during interrogation only in the government's case-in-chief. Following the logic of *Harris* and *Raffel,* and the principles of impeachment and Fifth Amendment waiver enunciated therein, the dictum would not prohibit asking a defendant on cross-examination, for

[11] By contrast, the ordinary application of the self-incrimination provision requires an affirmative assertion of a colorable claim that the information sought of the individual may tend to incriminate him. See, *e.g.*, *United States* v. *Kordel*, 397 U.S. 1, 10; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113.

[12] Theoretically, a similar analysis might be adduced in the case of the non-testifying defendant. However, the treatment of such a defendant's failure to take the stand as an "invocation" of the privilege against self-incrimination is firmly rooted in our law and reflects a reasonable presumption that such a defendant, if called to the stand, would invoke the privilege (he is, of course, not permitted to be called, because of the risk of impermissible prejudice if he is forced to claim possible self-incrimination before the jury). Whatever may be said of the exercise-of-right/penalty analysis in the *Griffin* context, however, we believe it would be inappropriate to extend it to the instant circumstances. Moreover, the situations are distinguishable insofar as the practice of comment and inference on a defendant's failure to take the stand entails a perceptibly greater hazard of prejudice flowing from the act of exercising the right (rather than simply the reasonable inferences arising from silence) than is present in the instant situation.

the purpose of impeaching his trial testimony and eliciting his "whole" story, why he remained silent at the time of arrest.

II. TESTING OF A DEFENDANT'S CREDIBILITY BY REFERENCE TO HIS PRIOR FAILURE TO GIVE HIS STORY TO THE POLICE NEITHER COERCES NOR IMPERMISSIBLY BURDENS HIS CHOICE TO REMAIN SILENT BEFORE THE POLICE, NOR IS IT UNFAIR

The court of appeals' conclusory assertion that use of an accused's silence at police interrogation to impeach his trial testimony is tantamount to a penalty upon the exercise of his Fifth Amendment privilege may also rest upon the unarticulated premise that this consequence impermissibly burdens the choice to remain silent. If this was the premise, however, it is difficult to see where the impermissible burden arises. In the first place, it seems to us speculative and even unlikely as an empirical matter that a defendant will be deterred from remaining silent during police questioning by the mere possibility that, should he testify at trial, he then might be called upon to explain why he had not earlier offered his story to the authorities, and that the jury then might be dissatisfied with his explanation. Such an adverse consequence is so remote from the circumstance of police interrogation and—assuming the defendant has a reasonable explanation for why he chooses to remain silent—so unlikely, that it cannot be assumed to have a real deterrent impact upon the decision to remain silent during police interrogation.

But even if it had some such effect, it does not follow that this represents an impermissible burden on the exercise of a constitutional right; rather, we submit that it represents a proper consequence of the defendant's election to withhold any explanation of suspicious circumstances from the police, while choosing to provide one at trial. In the following discussion we show that this consequence is considerably less onerous than many other constitutionally sanctioned consequences of choosing to remain silent, and that it does not improperly compel an accused to speak against his will. We next show that there is nothing "unfair" in telling an accused that he may remain silent without telling him of all possible adverse consequences that could flow from his decision to remain silent. Finally, we show that use of an accused's silence at the time of arrest to impeach his trial testimony does not jeopardize any of the values that the Fifth Amendment privilege is thought to protect.

A. *The possibility of impeachment of a defendant's testimony by reference to his prior silence is a far less severe detriment than other disadvantages that this Court has held may constitutionally attach to exercise of the privilege against self-incrimination, nor does it constitute an impermissible compulsion to answer police questions.*

Even assuming that the Fifth Amendment privilege is the source of an arrestee's right to silence and that the privilege is fulfilled only when he is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Miranda*

v. Arizona, supra, 384 U.S. at 460; *Malloy* v. *Hogan,* 378 U.S. 1, 8, it does not follow that, in order to be "unfettered," the choice must be without consequence. On the contrary, "nothing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." *Garrity* v. *New Jersey,* 385 U.S. 493, 507 (Harlan, J., dissenting).

1. We have already adverted to the "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan* v. *Tucker, supra,* 417 U.S. at 450. Manifestly, this includes knowledge of the defendant's failure to explain seemingly incriminating circumstances to the police at a time when the accuracy of the explanation could have been independently verified. On the other hand, from the standpoint of the accused, the possible adverse consequence at trial of remaining silent at police interrogation represents no hazard to the integrity of the privilege. Indeed, the consequence is nothing more than a nominal strategic disadvantage at trial: the possibility that, if he provides an alibi or exculpatory testimony at trial, he may be called upon to explain why he failed to offer information to the police, and the jury might be dissatisfied with his explanation.

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"This consequence simply does not amount to "compulsion" in the sense relevant for bringing the protection of the self-incrimination provision into play—*i.e.*, the kind of circumstance "likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *Garrity* v. *New Jersey, supra,* 385 U.S. at 497. It does not remotely resemble "the lurid realities which lay behind the enactment of the Fifth Amendment * * *, the pain of incarceration, banishment, or mutilation," *Griffin* v. *California, supra,* 380 U.S. at 620 (Stewart, J., dissenting). It is a far cry from such "penalties" for silence as third-degree torture, *Brown* v. *Mississippi,* 297 U.S. 278; prolonged isolation from family or friends in a hostile setting, *Gallegos* v. *Colorado,* 370 U.S. 49; physical and mental exhaustion from subjection to seemingly endless interrogation, *Watts* v. *Indiana,* 338 U.S. 49; loss of job, *Garrity* v. *New Jersey, supra*; or subjection to the kinds of police interrogation practices described in *Miranda* itself.

2. In fact, the possibility of such a strategic disadvantage at trial following upon silence during police interrogation is far less grave than many similar strategic disadvantages permissibly following upon invocation of the privilege in other circumstances. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. * * * The threshold question is whether compelling the election impairs to an appreciable extent any of the poli-

cies behind the rights involved." *McGautha* v. *California,* 402 U.S. 183, 213.

In *McGautha,* this Court faced a Fifth Amendment challenge arising from the dilemma confronting a defendant in a capital case under a state unitary trial procedure, in which guilt and sentence were decided by the jury in a single proceeding. The petitioner alleged, among other things, that his decision to exercise his constitutional right to avoid self-incrimination by not taking the stand at trial was unconsitutionally penalized by the fact that, by failing to take the stand, he lost his opportunity to be heard by the jury in mitigation of sentence and therefore suffered an increased risk of being sentenced to death. Present also was the suggestion that other defendants facing the dilemma would feel compelled to waive their right not to testify on guilt or innocence in order to secure an opportunity to testify in mitigation of sentence. After assaying the various tactical choices facing an accused during and before a criminal trial, Justice Harlan concluded in his opinion for the court that the pressures that might cause similarly situated defendants to furnish arguably testimonial or incriminating information were no different from other pressures licitly generated by the innate complexity of criminal litigation (402 U.S. at 216–217):

> We are thus constrained to reject the suggestion that a desire to speak to one's sentencer unlawfully compels a defendant in a single-verdict capital case to incriminate himself, unless there is something which serves to distin-

> guish sentencing—or at least capital sentencing—from the situations given above. Such a distinguishing factor can only be the peculiar poignancy of the position of a man whose life is at stake, coupled with the imponderables of the decision which the jury is called upon to make. We do not think that the fact that a defendant's sentence, rather than his guilt, is at issue creates a constitutionally sufficient difference from the sorts of situations we have described.

The Court's rationale, realistically taking account of the accused's inherent need to make tactical judgments about the conduct of his defense to criminal charges against him, would seem to apply with equal or greater force to the instant case. Just as a defendant's decision to waive his Fifth Amendment privilege for the purpose of mitigating his sentence is not constitutionally distinguishable from his decision to waive his privilege for the purpose of testifying in his own behalf, so too an arrestee's decision to "waive his privilege" at police interrogation for the far less drastic purpose of avoiding impeachment when he testifies at trial is constitutionally indistinguishable from his decision to waive his privilege at trial. Indeed, it is also procedurally indistinguishable, since an accused at police interrogation will feel induced to waive his privilege for this reason, if at all, only to the extent that he actually plans to waive his privilege at trial. Cf. *Brady* v. *United States,* 397 U.S. 742; *McMann* v. *Richardson,* 397 U.S. 759; *Parker* v. *North Carolina,* 397 U.S. 790.

An arrestee's evaluation of his options in deciding whether to speak or remain silent in response to police questions will depend upon many factors, such as his perception of the amount of information that the police already have obtained; his assessment of the likelihood that, should he cooperate with the police, he will be able to allay their suspicion and avoid subjection to criminal charges; or his expectation that by cooperation he may obtain more lenient treatment from the court. The decision whether to give exculpatory information is likely to be governed by the relative ease with which the authorities could verify the information and the likely impact of the information on their assessment of his guilt or innocence. If a relatively simple explanation of suspicious circumstances can lead to an arrestee's quick release from the criminal process, it seems to us likely as an empirical matter that he would offer it. There is, in any event, no basis for concluding that one additional factor in the calculus—the likelihood that if the exculpatory information is not offered to the police, and the arrestee is prosecuted, and he decides at trial to take the stand in his own behalf, he may then be required to explain his prior silence—would materially influence the decision to speak or remain silent, let alone that it would be so weighty as to overwhelm his ability to make a rational and voluntary choice.[13]

[13] In considering the question whether our position threatens to impose a constitutionally intolerable burden on the arrestee's decision to speak or remain silent, it is useful to distinguish between those who are guilty of the offense of which they are

3. *Williams* v. *Florida*, 399 U.S. 78, like *McGautha*, dealt with and sustained a procedure that imposed substantial adverse consequences on an exercise of the privilege. The Court in *Williams* upheld a notice-of-alibi statute requiring that a defendant who planned to present an alibi defense at trial provide the prose-

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suspected and those who are not. While we do not suggest that the guilty have any less right to be free from governmental compulsion to speak than the innocent, we do submit that their decision to stand mute is likely to flow from the fact that they have no satisfactory explanation to tender; they are thus unlikely to feel compelled to provide an explanation to the police by the prospect that a fabricated story presented at trial will be subject to impeachment in this manner.

Many innocent persons who can offer an explanation for seemingly incriminating circumstances will, of course, elect to do so in the hope that such action will bring about a speedy and favorable termination of police suspicions. Such persons, like the guilty, clearly would be unaffected in their election to speak by questions of possible future impeachment, since their choice is to speak in any event.

That leaves the group of arrestees who, although innocent and/or possessing a valid exculpatory explanation of seemingly suspicious circumstances, choose not to respond to police questioning—perhaps from fear or distrust of the police, perhaps from instinctive caution, timidity, or belligerence, perhaps in adherence to advice of counsel. Only as to this group could the possible future consequences of failure to respond to police inquiry materially affect the decision whether or not to speak. But these individuals already face immediate and substantial "compulsive" considerations, such as the prospect that their silence will result in the bringing of criminal charges against them. If they find the compulsion of such considerations resistible, it is hard to imagine that the remote and speculative possibility of adverse consequences at trial will provide meaningful compulsion to speak.

In short, it will as an empirical matter be the rare case indeed in which the possibility of future impeachment will actually operate to induce an arrestee to speak.

cution with the names of alibi witnesses before trial. It concluded that the statute does not unconstitutionally burden the defendant's Fifth Amendment privilege, even though failure to comply could result in exclusion of the alibi evidence at trial. The defendant in that case complied with the notice-of-alibi rule, and the state prosecutor used a deposition of the defendant's alibi witness to impeach the witness's testimony. The defendant claimed on appeal that his privilege against self-incrimination was thereby violated, since he had been required to furnish the State with information useful in convicting him, under penalty of being prohibited from presenting his alibi witness. This Court disagreed (399 U.S. at 83–85, emphasis supplied):

> The defendant in a criminal trial is frequently forced to testify himself * * * in an effort to reduce the risk of conviction. * * * That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against self-incrimination.
>
> * * * * *
>
> At most, the rule only compelled petitioner to *accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense* * * *.

Although pre-trial silence would of course have subjected Williams to the significant strategic disadvantage at trial of being barred from presenting an alibi defense, this consequence was not considered to impose an impermissible burden upon his election whether to remain silent.

The same logic would seem to compel a reversal in the instant case. If in consequence of maintaining silence prior to trial a defendant may be barred *altogether* from presenting his alibi defense during trial, surely it is permissible—and far less burdensome—to attach as a consequence of a defendant's silence in response to police questions the possibility that he may be asked to explain his silence should he subsequently decide to offer an alibi or exculpatory testimony during trial. We reiterate in this connection that his failure to present his story to the police does not bar him from presenting his story to the jury, as silence would have in *Williams:* it simply entitles the jury to know, when he presents it to them, why he failed to give the information to the authorities at the time of his arrest. At most, an arrestee who plans to take the stand and tell his story at trial, if concerned that he might then be asked to explain his previous silence, may be somewhat more likely to "accelerate the timing of his disclosure" than otherwise. But this consideration is hardly tantamount to an unconstitutional burden upon his choice to remain silent.

Nor does this consequence of choosing to remain silent at police interrogation unconstitutionally burden a defendant's decision to take the stand at trial.

A defendant who contemplates testifying in his own behalf is faced with many analogous—indeed, considerably more burdensome—disadvantages. Once he takes the stand, he cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination, see, *e.g., Brown* v. *United States,* 356 U.S. 148, *Fitzpatrick* v. *United States,* 178 U.S. 304, 314–316; he may also be impeached by proof of prior convictions, *Spencer* v. *Texas, supra,* 385 U.S. at 561; and if his motion for acquittal at the close of the government's case is denied, he risks bolstering the government's case sufficiently to support an otherwise unjustifiable verdict of guilty if he puts on a defense, *e.g., United States* v. *Calderon,* 348 U.S. 160. 164.

In sum, whatever the inducement that might be felt by an arrestee to respond to police questioning because he otherwise might be asked to explain at trial why he had not provided the same explanation to the police (or that might be felt by a defendant at trial to forego his opportunity to take the stand for the same reason), such inducement "does not derive from any coercion of the State, instead it arises from the desire of the accused to act in his own enlightened self-interest." *Segura* v. *Patterson,* 402 F. 2d 249, 253 (C.A. 10). An arrestee may feel slightly more induced to provide the police with exculpatory information than he otherwise would, or a defendant slightly more deterred from taking the stand, but only marginally so, and only to the extent that one course of action thereby becomes tactically more advantageous than another.

B. It is not "unfair" to advise an accused that he has a right to remain silent and then use his silence to impeach his trial testimony

Contrary to the assertion of the court of appeals, we see nothing "unfair" about advising an arrestee that he has a "right to remain silent" and then using his silence to impeach his trial testimony although he had not been warned of this possible development. The fact that future impeachment use may result from silence does not make it untruthful to advise a suspect that he has a right to choose silence. An accused is *not* advised that his choice to remain silent cannot be used against him.

Moreover, as has already been indicated, a defendant faces many tactical disadvantages from choosing to remain silent at different stages of the criminal process, and there is no warrant for assuming that these choices are uninformed simply because all the possibly disadvantageous consequences stemming therefrom are not spelled out at every juncture. Cf. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226. An accused who has an innocent explanation for otherwise incriminating circumstances certainly can be assumed to know that the consequence of choosing silence during police questioning is the rather drastic one of facing potential indictment, possible pretrial detention or bail, and trial.

The reason for requiring that an accused be told that he has a "right to remain silent" is to counteract what are thought to be coercive aspects of incommunicado police questioning. *Miranda* v. *Arizona, supra,* 384 U.S. at 457, 458. So long as the interrogation is fair and noncoercive, therefore, the accused presumably enjoys the "right" that he has been promised, and there is nothing misleading about advising him of this choice. Thus, in the instant case, there can be no question that the goals of the *Miranda* decision were served when respondent was given the election between speaking voluntarily and voluntarily remaining silent.

To the extent that the court of appeals discerned unfairness because of a surmise that respondent may have decided to remain silent in reliance on an implied promise that his silence would not be used against him at trial, it presupposes that the decision to remain silent must be as carefully circumscribed with assurances that it be "informed" as is the decision to speak. But this is tantamount to a requirement that the government provide warnings about all the possibly adverse consequences that may flow from invocation of constitutional rights—a requirement that has no logical foundation in the recognized need to assure that *waiver* of constitutional rights be knowledgeable. To assume that an accused has been somehow tricked into invoking his "constitutional privilege" because he may not have been aware of certain disadvantages that accompany its invocation is a peculiar notion that has no analog in the law of voluntary waiver or entrapment.[14]

[14] If this were indeed the ground of the court's decision, it implies that the cross-examination at issue would pass constitutional muster had respondent been apprised at police interrogation that, should he decide to take the stand at trial, his prior silence could then be used to impeach his credibility. While we have no objection to modifying the warnings in the future to provide such notice if this Court deems such modification necessary to assure fairness to arrestees, it seems to us that the addition

Johnson v. *United States,* 318 U.S. 189, 197, cited by the majority below, dealt with a defendant's decision whether to invoke the privilege at trial during the course of his trial testimony, without first being warned by the court that it would allow the prosecution to comment upon any claim of privilege as evidence of the truth of unexplained incriminating facts. This Court held that it would be unfair to allow the jury to consider the fact that the accused invoked the privilege under these circumstances, where "that action may be said to *affect materially* the accused's choice of claiming or waiving the privilege and results in prejudice." *Ibid.*; emphasis added. Use of an arrestee's silence at police questioning for the limited purpose of impeaching his trial testimony, however, could not be said to "materially affect" his choice of claiming or waiving the privilege.

C. The constitutional values and policies reflected in the privilege against self-incrimination were not impaired by the cross-examination of respondent

The values thought to be reflected by the privilege against self-incrimination were comprehensively catalogued by the Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55:

> The privilege against self-incrimination * * * reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment or abuses; our sense of fair play [and] * * * respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter for the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U.S. 155, 162 [footnote omitted].

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of such a statement might tend to confuse an arrestee about his constitutional rights and make it more difficult for him to understand the *Miranda* warnings.

The cross-examination in the case at bar did not undermine these values.

a. A suspect whose failure to respond to police questions may be used to impeach his trial testimony is not exposed to the "cruel trilemma of self-accusation, perjury, or contempt." Respondent was free to make a false statement or to remain silent (as he in fact did), without any fear of invoking at least two of the penalties of the "cruel trilemma"—perjury and contempt.

b. Neither would the rule for which we contend subvert the preference for an accusatorial system of criminal justice. Confessions, so long as they are voluntarily made, have a recognized and valid place in our accusatorial system. Since, for the reasons we have previously discussed, the possible use of silence for impeachment does not impair the voluntary character (in the constitutionally relevant sense) of the arrestee's election to speak or stand mute, the rule would not perceptibly alter the existing character of our accusatorial system.

c. Nor would such use increase the likelihood of inhumane treatment. Since it is an arrestee's *silence,* rather than any statements elicited by the police, that is used to discredit his trial testimony, the police have no incentive to violate the law and elicit statements coercively—an arguably "speculative possibility" of the rule enunciated in *Harris, supra.* Indeed, if such use of silence during custodial interrogation modifies police behavior in any direction, its likely tendency is to preserve an accused's right to remain silent by diminishing the determination of the police to procure a statement.

d. Nor are values of privacy jeopardized by such use of an accused's silence during police interrogation to impeach his trial testimony. Unlike a witness before a grand jury or legislative committee, whose appearance is not necessarily predicated on probable cause, a suspect lawfully arrested by the police has already satisfied the threshold requirement of probable cause. Moreover, by the time the prosecution makes reference to his silence, the individual has already gone to trial and has chosen to testify in his own defense. Indeed, he will choose to reveal personal information to the police, if at all, only to the extent that he plans to testify at trial and in so doing reveal the same personal information to the jury. Cf. *Williams* v. *Florida, supra.* This inducement to reveal personal information is therefore no more an assault on his privacy than is necessarily entailed by his own tactical choices within the legitimate criminal justice process.

e. Finally, this case implicates no concerns about the trustworthiness of "self-deprecatory statements." *Miranda, supra,* 384 U.S. at 455, n. 24, and 470; see 8 Wigmore, *Evidence,* § 2251 (McNaughton rev. ed. 1961). At most, an accused may decide that it is better to reveal his exculpatory evidence earlier (at police interrogation) rather than later (at trial). In no event, however, will the mere possibility that his silence at police interrogation might be subsequently used to discredit his testimony induce him to make unreliable self-deprecatory statements.

Under these circumstances—given that the only burden upon invocation of the privilege is a strategic disadvantage at trial of the sort inherent in our adversary system, and given the absence of any significant encroachment upon the policies or values reflected by the privilege—the decision below has failed to overcome the burden of justifying the exclusion of relevant evidence enhancing the jury's ability to assess the credibility of respondent's testimony. As Mr. Justice Frankfurter observed in *Nardone* v. *United States,* 308 U.S. 338, 340, "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." No such justification can be demonstrated here.

III. THE JURY IS COMPETENT TO GAUGE THE PROBATIVE WEIGHT OF SUCH IMPEACHMENT EVIDENCE

So far, our argument has focused on the proposition that the Fifth Amendment privilege poses no

necessary bar to cross-examination of a defendant who has given exculpatory testimony at trial as to why he failed to offer such information at the time of his arrest. There remains the issue whether, in these circumstances, the danger of impermissible use of this evidence so far outweighs its probative value that the jury should be denied an opportunity to consider it.[15] We submit that the risk of prejudice is dwarfed by the legitimate desire to protect against false and fabricated defenses and the concomitant need to subject the testimony of defendants to thorough cross-examination.

1. Common sense and human experience draw one inevitably to the conclusion that a suspect's failure to provide an explanation for seemingly incriminating circumstances at the time of arrest is probative on the issue of the veracity of the explanation of those circumstances offered at trial. By "probative" we do not, of course, mean that an arrestee's unwillingness to offer the police an explanation for seemingly incriminating circumstances conclusively establishes the falsity of any explanation tendered at trial. Doubtless there are times when a suspect has an explanation

[15] Even a rule so based would appear to have constitutional underpinnings, although it is far from clear whether this concern is grounded on the privilege against compelled self-incrimination or the due process clause. This Court in *Grunewald*, *supra*, did not state the constitutional source of its weighing of probative value against prejudicial impact in that case. It simply noted that, while such considerations are "usually within the discretion of the trial judge * * * where such evidentiary matter has grave constitutional overtones, as it does here, we feel justified in exercising this Court's supervisory control to pass on such a question." 353 U.S. 391, 423–424.

that would neutralize a seemingly incriminating circumstance but is nevertheless unwilling to provide it to the police at the time of arrest: *e.g.*, he may have been advised by counsel or may believe that he should never volunteer any statement to the police in such circumstances before reviewing the situation with a lawyer; he may fear that the explanation, although neutralizing one piece of evidence, will lead police to other evidence incriminating him in the offense under investigation or other offenses; his response to the situation may be dominated by fear or hostility impelling him to be silent. Nevertheless, it seems to us sufficiently likely as an empirical matter that a suspect will often provide the police with a genuinely innocent explanation that may lead to his quick release from the criminal process, if he has one, even after he is warned that he need not speak a word. This is particularly so because the opportunity to obtain prompt, independent verification of the explanation and to obviate suspicions of fabrication is likely to be evanescent.

We do not contend that the silence of a suspect, when questioned by the police after having been expressly told of his right to remain silent, may properly be treated or even considered as a tacit admission of guilt, since knowledge of the right to stand silent is a sufficiently probative explanation for having failed to admit incriminating facts. But it does not follow that the right to invoke the privilege provides a sufficiently probative explanation for a failure to provide *exculpatory* information. Indeed, the fact

that a suspect is not *required* to speak during police interrogation does not mean that there is never any *advantage* to be gleaned from speaking. If the police have erred in arresting a suspect, and he can provide them with information that reveals their error to them, it is likely to appear and to be more advantageous for him to speak than to hold his tongue. While it is undoubtedly helpful for an accused to know that he need not speak if he does not wish to do so, the *Miranda* warnings were never intended to prevent an arrestee from providing information that he believes will aid the police in discovering that he is innocent. Nor were they intended to promote the belief that silence is always the best course.

There is no reason why the jury should be shielded from this normally probative information, nor any reason to presume that the jury will be unable to assess it properly and give it such probative weight as it deserves under the circumstances in assessing the truthfulness of a defendant's trial testimony. The words of Mr. Justice Frankfurter, concurring in *Adamson* v. *California,* 332 U.S. 46, 60–61, are especially pertinent here:

> Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and rightminded men do every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process." * * * To deny that the jury can be trusted to make such discrimination [*i.e.,* assess the reasons for silence] is to show little confidence in the jury system.

The probative weight to be accorded any particular instance of silence will, of course, depend upon factors such as the relative ease of providing the information and the ease with which the police can discover its accuracy (we would expect, for example, that an accused would promptly reveal that he is not the person whom the police say they are seeking). It may also vary with the personal characteristics of the defendant—his age, experience in the criminal process, or personality—not to mention his demeanor while explaining the reasons for prior silence. But these are the kinds of factors traditionally entrusted to the jury in determining the credibility of a witness.

By the same token, there is no reason to suppose that, in assessing the credibility of a defendant's testimony, the jury will give this evidence so much greater probative weight than it deserves that he is impermissibly prejudiced thereby (particularly when, as here, the court provides an instruction cautioning the jury that the defendant is not required to give any explanation to the police). A defendant who is asked on cross-examination why he failed to give a similar explanation to the police has an opportunity to inform the jury of his motive for withholding the information, and there is no justification for assuming that the jury will not accord this secondary explanation its proper weight. "The value of such testimony, as is always the

ease with cross-examination, must depend upon the nature of the answers elicited; and their weight is for the jury." *Raffel, supra,* 271 U.S. at 498.

Indeed, the jury is often called upon to assess the credibility of a defendant's testimony by reference to evidence that may be deemed too prejudicial for use in the prosecution's case-in-chief, such as evidence of prior convictions, *Spencer* v. *Texas, supra,* 385 U.S. at 561, and evidence of the defendant's reputation for mendacity or bad character when character has been put in issue, 1 Wigmore, *Evidence,* §§ 58, 196 (McNaughton rev. ed. 1961). Even assuming, therefore, that the jury should be shielded from giving consideration, as evidence of guilt, to the fact that a defendant failed to give exculpatory evidence to the police, we see no reason to shield the jury from giving consideration to this circumstance as evidence bearing upon the truthfulness of the defendant's exculpatory testimony at trial.

In any event, even if considerations of due process might require that the jury be barred from considering such evidence in particular circumstances, where the trial court determines that its probative value is outweighed by its potentially prejudicial impact upon the jury, the decision to prohibit such a line of cross-examination should be within the discretion of the trial court:

> [M]any hundreds of potential relevancy issues passed before the trial judge. It is neither desirable nor possible for this court to lay down any general rule that will serve as a solution for every issue, for it is a different question of experience and common sense in each instance.

> * * * The precedents in the area of relevancy are of very limited value, and the trial judge must have wide discretion on the innumerable questions of relevancy before him. [*State* v. *Anderson,* 253 S.C. 168, 182, 169 S.E. 2d 706, 712, rehearing denied, 397 U.S. 1031. See also *United States* v. *Ravich,* 421 F. 2d 1196 (C.A. 2).]

See also ALI, Uniform Rules of Evidence, Rule 45; Fed. R. Evid. 403. The Fifth Amendment privilege is not so implicated, as a matter of course, that a *per se* rule barring such cross-examination is either necessary or desirable in order to avoid the possibility of undue prejudice.[16]

[16] This view is similar to that of the British Criminal Law Revision Committee. In its report presented to Parliament in 1972, the Committee recommended that it should be "permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defense which he puts forward at his trial." Criminal Law Revision Committee, Eleventh Report, Evidence (General) 16 (1972). Prior English law generally did not permit comment on a defendant's prior silence. See *id.* at 16–17; Cross, *Evidence,* 180 (1967). Under the Committee's recommendation, the suspect would retain the right to remain silent, but if he did so, that fact might be introduced at trial. It would be for the court or jury to determine if an adverse inference should be drawn from the defendant's prior omission. The Committee stated (at p. 21):

"In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated, to mention a defense which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice. * * *"

2. We submit that the circumstances that led the Court to bar the use of a defendant's prior invocation of the privilege before the grand jury as a means of discrediting his trial testimony in *Grunewald* v. *United States,* 353 U.S. 391, are readily distinguishable from, and inapplicable to, the case at bar. *Grunewald* rested on "the special circumstances" (*id.* at 425; Black, J., concurring) of a defendant whose invocation of the privilege in that "particular grand-jury proceeding" (*id.* at 423) was not at all inconsistent with his trial testimony, but was instead likely under the particular circumstances to have a prejudicial impact upon the jury, as is evident from the Court's unwillingness in that case to overrule *Raffel* and announce a new *per se* rule of inadmissibility, as the four concurring Justices would have done (*id.* at 426). The Court's inquiry proceeded no further than the threshold finding that the probative value of the particular invocation at issue was too small relative to its potential for prejudice (*id.* at 424):

> [I]n this case the dangers of impermissible use of this evidence far outweighed whatever advantage the Government might have derived from it if properly used. If the jury here followed the judge's instructions, namely, that the plea of the Fifth Amendment was relevant only to credibility, then the weight to be given this evidence was less than negligible, since, as we have outlined above, there was no true inconsistency involved; it could therefore hardly have affected the Government's case seriously to exclude the matter completely. On the other hand, the danger that the jury made impermissible use of the testimony by implicitly equating the plea of the Fifth Amendment with guilt is, in light of contemporary history, far from negligible. Weighing these factors, therefore, we feel that we should draw upon our supervisory power over the administration of federal criminal justice in order to rule on the matter.

With respect to the probative value portion of the equation, the Court stressed that the defendant's invocation of the privilege was not inconsistent with his testimony at trial. "Had he answered the questions put to him before the grand jury in the same way he subsequently answered them at trial, this nevertheless would have provided the Government with incriminating evidence from his own mouth" (*id.* at 421–422), since an unexplained admission before the grand jury that he knew one of the co-defendants would have linked him with a criminal conspiracy. *Id.* at 422. Its conclusion was "fortified" by the fact that the defendant had "repeatedly insisted before the grand jury that he was innocent and that he pleaded his Fifth Amendment privilege solely on the advice of counsel" (*ibid.*). Moreover, by the time he refused to answer the grand jury's questions, the grand jury had already heard testimony from his co-defendants, and "it was evident that [the defendant] was faced with the possibility of an early indictment." In these circumstances, the Court reasoned, "many innocent men who know that they are about to be indicted will refuse to help create a case against themselves * * *." *Id.* at 423.[17]

[17] The Court also noted, as factors rendering the claim of the privilege before the grand jury not probative on the verac-

Looking to the other side of the balance, the Court in *Grunewald* feared that knowledge that a defendant had refused to testify on the specific Fifth Amendment ground that his answers might tend to incriminate him would prejudice the jury against him, since it was likely that some jurors would equate an explicit assertion of the Fifth Amendment privilege with a confession of guilt. Moreover, the trial judge had refused to charge, as the defendant had requested, that "an innocent man may honestly claim that his answers may tend to incriminate him." *Id.* at 421, n. 32. "Weighing these factors," the Court concluded that it was prejudicial error for the trial court to permit cross-examination of the defendant on his invocation of the Fifth Amendment privilege before the grand jury. *Id.* at 424.

In considering the failure of a suspect to explain seemingly incriminating circumstances to the police, however, the balance between probative value and prejudicial impact swings solidly in the other direction. Here, had respondent explained to the police that his wife gave him the money found on his per-

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ity of trial testimony, certain characteristics of the grand jury proceeding, such as the absence of counsel, the inability to call witnesses, the lack of a right of cross-examination, and the secret nature of the proceedings. 353 U.S. at 422. Similar characteristics pertain to custodial questioning by the police. However, we submit that a fair reading of the *Grunewald* opinion demonstrates that those factors, standing alone, would not have been dispositive; they simply reinforced a result derived from other considerations affecting the weight that could reasonably be attached to the invocation of the privilege, considerations that are absent in the case at bar.

son, as he subsequently explained at trial, he would not have incriminated himself. Indeed, had the story checked out, respondent might have been released then and there from the criminal process. At the very least, the evidence of his possession of the money would not have been used against him at trial. Thus, there is good reason to suppose that, even after receiving *Miranda* warnings, he might well have offered such an explanation and neutralized the suspicion arising from that circumstance. Respondent's failure under these circumstances to explain the source of the money found on his person soon after the robbery therefore cast some real doubt upon the veracity of his subsequent explanation at trial.

Moreover, his interrogation occurred soon after he was apprehended—before he had any firm idea that evidence was being gathered against him and long before he "knew he was about to be indicted." Thus, unlike the defendant in *Grunewald,* respondent was not so far along in the criminal process that his refusal to provide an explanation was likely to reflect a tactical decision. On the contrary, respondent was interviewed at the start of the criminal process, when he could reasonably have expected that, had he provided sufficiently exculpatory information, he could have avoided the prosecution of the robbery charge against him.

At the same time, cross-examination in the instant case presented little chance of prejudice. The jury was not told that respondent had remained wholly silent before the police, nor that he had invoked his

Fifth Amendment privilege. Indeed, unlike a grand jury witness who must affirmatively invoke the privilege, an accused during police interrogation need never make such an affirmative invocation by asserting that his explanation might be self-incriminatory.

Moreover, the government's cross-examination merely disclosed that respondent had not explained to the police the circumstances surrounding his possession of the money. Respondent replied at trial that he had not offered the explanation to the police because "he didn't feel it was necessary at the time." The jury might infer from this colloquy that the defendant was not telling the truth about the source of the money. It is unlikely, however, that the jury would infer from this that he had remained silent before the police because he feared he would otherwise incriminate himself.

Finally, immediately following this colloquy, the district court—unlike the trial court in *Grunewald*—cautioned the jury (App. 5):

> He is not required to indicate where the money came from. There is no responsibility on his part in regard to that. * * * The defendant is not required to give any explanation whatsoever at the time of his arrest.

Had the jury any remaining doubt about the irrelevance of respondent's silence to the issue of his guilt, this instruction would have removed that potential for prejudice.

In summary, there is no reason in logic or policy for presuming that the jury is ill-equipped to assess

the probative weight of evidence showing that the defendant failed to give the exculpatory information he presents at trial to the police at the time of his arrest. None of the special circumstances of *Grunewald,* dealing with invocation of the privilege before the grand jury, are present with regard to the probative value, for purposes of the jury's assessment of the veracity of the defendant's trial testimony, of the fact that he previously failed to explain seemingly incriminating circumstances to the police.

CONCLUSION

It is therefore respectfully submitted that the decision of the court of appeals should be reversed.

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FEBRUARY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975